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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-195

No. ~~1957~~

STEVE P. XYDAS,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES OF AMERICA

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Petitioner prays that a writ of Certiorari be issued to reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled case on April 21, 1971.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, decided on April 21, 1971, has not yet been reported, but a copy of said opinion is attached hereto as Appendix A, pp. 1a to 18a *infra*. The judgment of the United States District Court for the District of Columbia was entered on January 22, 1968.

JURISDICTION

The judgment of the court of appeals (Appendix A, *infra*) was entered on April 21, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Was petitioner denied due process of law by being refused access to subpoenaed F.B.I. records which were pertinent to petitioner's major defense.

2. Was it reversible error to deny petitioner the right to enter into evidence the transcript, or its contents, of a taped conversation between government agent, James Skeens, and petitioner, overheard by Captain Thomas Wert of the Metropolitan Police Department.

3. Was petitioner denied a fair trial on the charge of interstate transportation of stolen goods by the adduction of evidence against him relative to a charge of housebreaking, a charge of which he was acquitted, since his defense on the interstate charge was based on the question of his personal integrity and sense of responsibility, and his desire to help the authorities. The question of his mental attitude being determinative in considering his innocence or guilt, the introduction of the above evidence could not but prejudice the jury against him.

CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED

Constitutional Provision:

Amendment 5:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Statutes Involved:

Title 5, U.S.C. Section 552, effective July 4, 1967.

Title 18, U.S.C., Section 2314.[1]

STATEMENT

Steve Xydas was charged in a three count indictment for housebreaking, grand larceny and interstate transportation of stolen goods.[2] He was tried and found not guilty by a jury on the first two charges and guilty on the third. He was sentenced from one to three years on the third charge and is presently on personal bond pending appeal.

Since April 9, 1959, Xydas has owned and operated a small restaurant and cafe (Tr. Vol. 4, p. 484)[3] in a lower middle class neighborhood at the corner of 8th and F Streets, N.E., a block away from No. 9 Precinct of the Metropolitan Police Department.[4] Over the years his establishment was much frequented by Police Officers (Tr. Vol. 2, p. 257),

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[1] Reproduced as Appendix B, *infra*, p. 19a.

[2] Xydas was originally charged together with 15 other defendants in an 11-count indictment. After the beginning of the trial herein, the indictment was re-drafted on three counts. A fourth conspiracy count was ultimately dismissed.

[3] Record references are to the transcript of the proceedings in the United States District Court.

[4] As a result of this conviction, Xydas' application for renewal of his alcohol beverage license which he had held for ten years was not renewed, nor was his hacker's license.

a source of pride to Xydas. Agents of the Federal Bureau of Investigation also frequented the restaurant over a period of years from 1959 on an irregular basis. Xydas would sit down informally with these agents and pass information to them in connection with their work. During this time, Xydas considered himself to be acting as an unpaid agent. To substantiate Xydas' feeling of being a secret agent, although he received no pay for information given, he was allowed to carry on petty gambling and numbers activities which could not have gone unnoticed by the agents.

A. The Haley Housebreaking

One of Xydas' customers was a woman by the name of Patricia Haley who lived around the corner from his restaurant at 518 9th Street, N.E. across from No. 9 Precinct and who spent a great deal of time in the restaurant and became friendly with Xydas and the others who worked there. Xydas placed numbers bets for her from time to time and on two occasions she won, on March 20. 1964 and April 2, 1964. (Tr. Vol. 1, p. 137, 148).

On May 13, 1964 while Xydas was at the Shenandoah Racetrack, Robert Earl Barnes[5] and several confederates planned and burglarized Patricia Haley's apartment and stole $1,600.00. Barnes' statement in his letter to then United States Attorney David Acheson in July 1965 implicated Xydas. There was no corroboration of Barnes' testimony at Xydas' trial concerning the Patricia Haley matter and the jury found Xydas not guilty of both count one - housebreaking - and count two - grand larceny. The govern-

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[5]Xydas met Robert Earl Barnes, a professional burglar, early in 1964 and was on a speaking basis with him as he was with all his regular customers. Barnes was the key government witness in a number of cases involving the operations of a burglary ring in the District of Columbia.

ment, moreover, was in possession of grand jury testimony[6] exonerating Xydas from any involvement in the Haley matter.

B. The French Poodle Burglary

The charge on which petitioner was convicted arose out of a burglary committed on the night of August 22, 1964 in Washington, D.C. On that evening, three individuals, Barnes, Baker and Hamilton, all acquaintances of Xydas, broke into the French Poodle Dress Shop located at 1211 Connecticut Avenue, N.W., and stole approximately 96 furs and fur-trimmed articles of women's clothing. The furs were placed in a rented truck and initially transported to the house of James Skeens in Landover, Maryland.

At about 3:10 a.m. on the morning of August 23rd, Skeens called Xydas at the latter's home. Xydas' wife answered the call and then woke her husband. Skeens told Xydas that he and Barnes wanted to see Xydas. Xydas dressed and met the men outside his house. They asked Xydas to store some furs in his basement, which Xydas refused to do, arranging, however, for the furs to be stored at his sister's garage in Riverdale, Maryland. The furs were unloaded from the truck and stored in the Riverdale garage to await their anticipated sale to buyers from New York.[7] Xydas was given two furs for his assistance.

Subsequently, Xydas sought out F.B.I. agent Carl Giovanetti, the agent with whom he had been dealing most recently. Giovanetti was in the Washington Hospital Center after undergoing surgery, and Xydas saw him sometime before

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[6]Testimony of James T. Skeens before grand jury on January 10, 1966, copies of which were denied the defense.

[7]The furs were removed from the garage and apparently were sold before any of the arrests herein. Petitioner was not charged with any complicity in the interstate transportation of the furs from Maryland to New York.

September 14, 1964. Giovanetti was too ill to listen, but named two other agents for Xydas to contact. Xydas contacted these agents on September 15, 1964, at which time he told them about the incident and the fact that he had two dresses and a fur cape.[8] Xydas identified Barnes and Skeens as the perpetrators of the burglary and subsequently turned the furs he had been given over to the F.B.I.

The government's contention was that Xydas participated in the inception of the burglary by means of a telephone call the morning of August 22, the date of the burglary of the French Poodle. According to Barnes, the government's chief witness, Xydas agreed to store the furs that were to be stolen in his basement, thereby aiding and abetting the interstate transportation of the stolen furs by agreeing prior to the theft to provide a place to store them.[9]

The thrust of the government's case was that it took approximately three weeks for Xydas to contact agent Giovanetti, who was in the hospital part of this time. Petitioner, although admitting his acquaintance with Barnes and Skeens and his agreement that the furs be brought to his house and later stored in the garage of his sister, denied any knowledge of the theft prior to its occurrence. He insisted that his first involvement in the situation came when he received the early morning telephone call on August 23rd (after the burglary) from Barnes and Skeens; that he arranged for storage of the furs in his sister's garage in order to turn Barnes and Skeens over to the F.B.I.; and that he kept the two furs given to him by Barnes as evidence with which to provide the F.B.I.

Consequently, the question of Xydas' intent is the major issue herein. In proving or disproving petitioner's intent,

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[8]Copies of the F.B.I. interviews held on September 15 and 16 were provided to Xydas.

[9]The only evidence of this prearrangement was Barnes' testimony (Tr. Vol. 3, p. 296) which was contradicted by Barnes' own statement made to the Grand Jury (Tr. Vol. 3, p. 315-317A and p. 340).

all exculpatory statements made were of crucial importance to the defense theory. To deny the defense access to these statements which were in F.B.I. possession constituted a denial of due process of law.

REASONS FOR GRANTING THE WRIT

1. Petitioner issued a subpoena to the F.B.I. for records showing his contacts with them. These records were duly presented in court but instead of being turned over to counsel for Xydas, they were presented to the prosecuting attorney who promptly moved to quash the subpoena. During the discussion in court on this motion, the government presented to counsel a proposed stipulation which, if accepted by Xydas would have been enough to convict him by itself. When this was refused by Petitioner, the government presented the second proposed stipulation which again was very damaging to him.

The government, during these proceedings on its motions, acted as prosecutor, attorney for the F.B.I. and at the same time as a quasi-defense attorney to the extent of going through the F.B.I. records that the defendant subpoenaed, picking out what it though the defense should have.

At the point where the first and second proposed stipulations were refused, the court granted the government's motion to quash the subpoena. Xydas, consequently, was obliged to accept whatever information the government gratuitously offered, the result being a stipulation of dates of Xydas/F.B.I. contacts without background or detail. (Appendix A, pp. 6a-8a, *infra*.)

Moreover, the gratuitous stipulation which was all that petitioner could get from the government was then used by the government to damn Xydas. For example, in Tr. Vol. VI, page 803, during the final stage of the closing argument, the prosecuting attorney referred to the stipulation at great length. And on page 814, he said that Xydas' cooperation with the F.B.I. was empty; that it was not cooperation but amounted only to getting something off his mind.

The danger inherent in a situation of this nature is underlined by Judge Bazelon's concurring note in the instant court of appeals opinion where he stated that "this case indicates again the hazards of relying on the prosecutor and the trial judge to look after the defendant's interest." (Appendix A, p. 18a, *infra*). See also *Giles v. Maryland*, 386 U.S. 66, 99-102 (1967) concurring opinion of Judge Fortas.

The issue of Xydas' good faith in going to the F.B.I. with information after the French Poodle burglary was the jury's ultimate consideration. Without access to the F.B.I. records, Xydas was handicapped in attempting to prove his belief that he was an agent without pay for the F.B.I. This Court has clearly held that a defendant and his counsel should have the opportunity to determine need for documents. It is not a question which should be left to the discretion of a trial judge who is not privy to counseling between client and attorney. *Dennis v. United States*, 384 U.S. 855 (1966).

2. During the course of the trial, counsel for petitioner arranged with the prosecuting attorney and Capt. Thomas Wert, the custodian of the tape of a telephone conversation between James Thomas Skeens, an informer agent, and Xydas on February 5, 1966, to have Judith Derenberger of the Derenberger Reporting Co. transcribe this conversation.

On September 25, 1967, the transcript was presented to the court and counsel stated that it was his intention to question Capt. Wert or Capt. Woodard, both of whom were available, as to questions about what they overheard when monitoring this conversation.

The government objected to this, stating that there was nothing admissible about the contents of the conversation, and that it was merely a self-serving declaration. (Tr. Vol. IV, p. 467).

The contents of conversations which were obtained in similar manner, that is, by the government's using an informer agent, to question prospective defendants was admitted in the trials in the case of *United States v. Wal-*

lace, et al., Crim. 486-66, and subsequently, in the trial of *United States v. Klein, et al.*, in Crim. 595-66, supposedly as admissions against interest.

Although counsel has repeatedly stated his position that the method of obtaining this evidence was illegal and thus not usable in evidence, in fairness to petitioner, if tainted evidence is to be used at all it should not be denied him where it may very well help to exonerate him.

The importance of this taped conversation is that it shows that Xydas was not involved in the Haley housebreaking. According to all of the government's evidence, Skeens was a participant. Thus Xydas could not deny directly to Skeens any involvement had he, in fact, participated. Xydas stated:

> "You knew I didn't have anything to do with the Haley case."

and Skeens answered back to him,

> "Well, I don't know anything about it and I don't know whether you did or not."

As counsel pointed out at that point (Tr. Vol. IV, page 469), if Skeens and Xydas were sitting in a booth with Barnes, planning and setting up this housebreaking, they wouldn't later start accusing each other and denying their participation to one another.

The trial court first found nothing of an exculpatory nature on the tape (Tr. Vol. IV, p. 470); later went on to add that there was, in fact, a denial of participation; and finally held the tapes to be inadmissible in any event (Tr. Vol. IV, p. 471).

Exculpatory Statements

There was considerable discussion during the trial as to what constitutes an exculpatory statement under the doctrines of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Levin v. Katzenbach*, 124 U.S. App. D.C. 158, 363 F.2d 287 (1966), on appeal after remand, *Levin v. Clark*, 133 U.S.

App. D.C. 6, 408 F.2d 1209 (1967). For example, an excerpt read into the record from the written statement of one Martha Painter gave the following information:

> Question to Martha Painter: How long after she hit the number did the place get broken into?
>
> Answer: It was not much longer. I don't think because *the night that it happened I remember Mr. Xydas went to Shenandoah* and when he came back he didn't come in the restaurant. He stopped the car outside and I told him Pat's apartment was broken into. I said she is so upset she is crying. As soon as we close we will go over there. (Gov't Exhibit 2) (Emphasis added)

The prosecuting attorney, who had previously stated that in his opinion this was not an exculpatory statement reiterated this opinion. Petitioner contends that the fact that Martha Painter had stated that to her knowledge Xydas was in Shenandoah the night of the Haley housebreaking would never have come out if she had not been called by the defense as a witness and the underlying purpose of the *Levin* and *Brady* doctrine is to provide the defense with whatever exculpatory information the government has before or at the outset of the trial so that they can call in witnesses that they might not have known about. Without access to such statements, the defense cannot know how many other such statements are in the F.B.I. files.

On September 12, 1967, at a preliminary hearing Xydas requested to see the entire Barnes grand jury testimony, Vol. I, pages 29-30 of that hearing. The request was denied. However, when excerpts was given to the defendant, it was found, on pages 135-136 of his grand jury testimony there was a complete exoneration of Xydas as to the *planning* of the French Poodle burglary in contradiction to Barnes' testimony at the trial.

Page 136 reads as follows:

> Barnes: So what we figured on doing was stashing the furs until we could get somebody to buy them

> *but we forgot to find a place to stash them* so we called Steve Xydas and told him that we had a truck load full of furs . . . . (Emphasis supplied)[10]

At the September 15, 1967, pre-trial hearing, counsel advised the government and the court that there were exculpatory statements by James Skeens in his grand jury testimony. This exculpatory statement was finally produced and read into the record.[11]

As stated above, a crucial question in the French Poodle burglary was whether or not petitioner knew in advance that the burglary was to take place. Subsequent to the instant trial, counsel, in the course of another trial, received page 1809 of Marsha Skeens grand jury testimony relating to the French Poodle case. Mrs. Skeens had testified as follows:

> When the furs were stolen, they had taken them to my house to begin with, and my neighbors were having a—you know, they watch me anyway. So they decided not to leave them there and they took them to Steve Xydas' sister . . . .

This statement is clearly exculpatory, and the failure of the government to provide it is sufficient to warrant a reversal and new trial.[12]

It is not for trial court and court of appeals to judge the "favorability" of the exculpatory statement, but rather for petitioner and his counsel in the preparation of their defense —and, of course, ultimately for the jury in its deliberation.

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[10]For the full two-page quote that this sentence was taken from, see Transcript Vol. III, p. 340.

[11]The statement is discussed in Section 3, *infra*, p. 15-16.

[12]In finding that the denial of this statement to the defense was not reversible error, the court of appeals discusses in some detail the possibilities of defense counsel's interviewing Mrs. Skeens. (Appendix A, pp. 13a-15a, *infra*). The court, however, apparently has overlooked the fact that should Mrs. Skeens prove a hostile witness, her previous statement could prove crucial to the defense theory.

3. Petitioner was originally charged with conspiracy, grand larceny and transporation of stolen goods. The Assistant U.S. Attorney in charge of the so-called Barnes investigation stated to Commissioner Sam Wertlieb at Xydas' preliminary hearing on April 20, 1966;

> "What has been shown, is that Steve Xydas manipulates an organized, large housebreaking ring . . . ." Commissioner's Transcript, page 45.

He also made numerous similar references throughout the trials of the case of *United States v. Wallace, et al.*, Cr. 486-66, and *United States v. Klein, et al.*, Cr. 595-66, the other cases involved in the Barnes investigation.

Nevertheless, upon presentation of a motion to sever, without any ruling by the Court, the government voluntarily agreed to dismiss the conspiracy count against Xydas conditioned on going forward with the housebreaking and grand larceny (Haley), and the transportation of stolen goods counts (French Poodle). In order to avoid trial in the large conspiracy count Xydas was obliged to defend these other charges.

The government knew that Xydas had helped store the furs in the French Poodle case; it also was aware that Xydas' defense was that his participation was not unlawful since he was the informer who had told the F.B.I. who committed the French Poddle theft. Thus his defense could only be that he was helping Barnes and Skeens in order to trap them.[13]

In consequence, Xydas' character, credibility, reliability and due diligence were the crucial issues in the French Poodle charge. There was nothing in Xydas' record that could be used to impeach him when he took the witness

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[13]It is likely that the F.B.I. record, unavailable to the defense, shows previous information given by Xydas to the F.B.I. concerning Skeens' activities.

stand.[14] And there were admissible, or at least provable dealings with the F.B.I. since 1959, and therefore, a strong likelihood of acquittal.

However, interjected during the trial, throughout the Pat Haley counts of housebreaking and grand larceny, was evidence of Xydas' petty gambling activities and the odious charge of setting up a good friend and customer (Patricia Haley) to be robbed.

If this Honorable Court will consider the *Bruton* case[15] (though the facts have no similarity) it is apparent that the jury's verdict of guilty in the French Poodle count might very well have been influenced by the evidence in the Haley case, notwithstanding the not guilty verdicts on the two counts of housebreaking and grand larceny.

Petitioner contends that the government had sufficient knowledge that Xydas was not guilty of the Haley charge to require it in all fairness not to try him simultaneously on these charges, knowing the highly emotional and prejudicial effect the Haley evidence would have on the jury in its deliberation concerning the French Poodle defense of lawful activity in the interest of continuing the long established custom of informing for the F.B.I. This evidence is as follows:

(a) At the commencement of the trial the government had in its possession a letter to former United States Attorney, David Acheson, from Barnes, sent July 1965, in which he gave one version of the Haley housebreaking, and the prosecuting attorney was present at the preliminary hearing in which Barnes gave an entirely different version on substantial elements of the housebreaking about which he could

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[14] Xydas' formal record stipulated to and read to the jury, was free of any convictions and contained only two old misdemeanor arrests (1941 and 1948) which were nolle prossed.

[15] *Bruton v. United States*, 391 U.S. 123 (1968).

not be mistaken.[16] In both versions, however, Barnes maintained Skeens to have been a participant.

(b) At the commencement of the trial, the Government had a transcript of Skeens' sworn testimony before the Grand Jury (pages 1883-1884) on January 10, 1966, in which he told the grand jury that Xydas had nothing to do with the Haley housebreaking.[17]

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[16]The reference in the Acheson letter states:

> "3. Women that lives across from No. 9 station, but moved to Cheverly Terrace Apts. Steve Xydas called Skinner, told him to bring me down to his Bar. I went down there with Skinner and Steve said a buy name Earl would be down with a score in a few minutes. He said a broad hit the no. a day or so before, but he didn't know where she kept the money, but Earl had found out. Earl came in and asked Skinner and Steve if I could open the apartment door. He was assured I could. Earl then said he had stayed with the woman the night before and that she had the money in the bedroom in the dresser drawer. He said that it would be a four way split as it was such an easy score. Skinner and Earl went with me and showed me the apt. no. then they went downstairs to wait. It was raining. I got $1,600.00 and we split it up at Steve's $400.00 a piece. Later the broad told Earl I left some money in a boot, also told Steve I never took her rings."

At the preliminary hearing, however, Barnes said he did not know where the money was kept and that it took him about 40 minutes to find it in the dresser drawer, after ransacking and demolishing the apartment, and that because of this a fair split was $1,000 to him and $200 apiece to the other three involved: Skeens, Earl and "the other man." Commissioner's Hearing Transcript, pp. 20-21, 26, 30, 33-34, 37, 40, 43.

[17]The transcript reads as follows:

> Sullivan:
>
> Q. Do you know whether Steve Xydas had anything to do with the setting up of the burglary of the Pat Haley apartment across from the No. 9 Precinct?
>
> Skeens:
>
> A. No, sir. I don't think he did.
>
> Q. You don't think that he did?
>
> A. No, sir.

[continued]

Attempt was made by Petitioner to get this important information to the jury through Skeens and also through the prosecuting attorney, to no avail. (Tr. Vol. IV, pages 409-429).

(c) At the commencement of the trial the government had a tape recording of a telephone conversation between Skeens and Xydas, referred to above. In this conversation, Xydas flatly denied to Skeens any participation on *his* part

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Q. Do you know who did that burglary?

A. No, sir.

Q. Barnes claims that he actually went into the apartment; that you were physically present in the area at the time that happened? Is that correct?

A. Yes, sir.

Q. He states that Earl Beeman was also present in the area at that time. Is that likewise correct?

A. No, sir. It isn't.

Q. Beeman was not present?

A. Not present at that time.

Q. I see. Beeman according to Barnes' information, knew about Pat Haley going to be away from her apartment at the time that Barnes actually burglarized it. Had you ever heard that from Beeman?

A. No, sir.

Q. Did Beeman know about the planned burglary before it actually took place?

A. Yes, sir.

Q. According to Pat Haley she actually won money from Xydas on the numbers just some weeks before she was burglarized.

A. Yes, sir. Coming back to Xydas on that, I think he talked to Barnes previously to that, that she had won some money.

Q. I see.

A. As far as him knowing that he set up the job, I don't know that.

Q. But from your information, Xydas told Barnes that Pat Haley had won money. Is that correct?

A. That is correct.

in the Haley matter and it is obvious that if these two had participated as it was claimed, Xydas would not be in a position to deny it directly to Skeens.

(d) In its opening statement, the government claimed that Harold Baker "who was likewise a burglar" (Tr. Vol. I, p. 96) would testify that Xydas admitted the Haley housebreaking, notwithstanding the fact that Baker neither in his grand jury testimony nor in his statement to the Internal Investigation Unit which was turned over to the defense, ever made such a statement, nor did he so testify in Xydas' trial.

(e) The government at the commencement of the trial had a statement (Government Exhibit No. 2 in indentification) by Martha Painter made to the Internal Investigation Unit in which she stated that at the time of the Haley housebreaking Xydas was at the Shenandoah Racetrack (Tr. Vol. IV, pages 396-397, 401-403).

With all the above exculpatory information in its possesion the government went forward and filled the trial with numerous references to gambling and the numbers racket. Putting aside all the accusations, smears and charges against petitioner, the only real charge against him was that he was not sufficiently diligent in reporting to the F.B.I. the details of the French Poodle burglary. The question of diligence, however, is a subjective one and Xydas should have an opportunity, without the taint of irrelevant, prejudicial evidence to demonstrate before a jury that he did, in terms of his personal pattern of behavior, use due diligence. This device, whereby the government introduces evidence on a charge where it has sufficient knowledge to know of the defendant's innocence, is inherently unfair in that it prejudices a jury which must decide a further unrelated issue. This tactic, in fact, constitutes a denial of due process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A -

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,893

STEVE P. XYDAS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Judgment entered this date

Decided April 21, 1971

Mr. Ira M. Lowe, with whom *Messrs. Michael M. Kearney* and *Stephen S. Millstein* were on the brief, for appellant.

Mr. Harold J. Sullivan, Assistant United States Attorney, with whom *Messrs. Thomas A. Flannery,* United States Attorney, and *John A. Terry,* Assistant United States Attorney, were on the brief, for appellee.

Before BAZELON, *Chief Judge,* VAN DUSEN,* *Circuit Judge,* U. S. Court of Appeals for the Third Circuit, and WILKEY, *Circuit Judge.*

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*Sitting by designation pursuant to 28 U.S.C. § 291 (a) (1964).

Opinion filed by WILKEY, *Circuit Judge.*
Concurring opinion by BAZELON, *Chief Judge.*

WILKEY, *Circuit Judge:* Appellant Xydas was convicted on one count[1] of violating 18 U.S.C. §2314, interstate transportation of stolen goods.[2] On this appeal he raises several points, only two of which require discussion.

I. FACTUAL BACKGROUND

The charge on which appellant was convicted arose out of a burglary committed on the night of 22 August 1964 in Washington, D.C. On that evening, three individuals, Barnes, Baker, and Hamilton, all acquaintances of appellant Xydas, broke into the French Poodle Dress Shop at 1211 Connecticut Avenue, N.W., and stole some 96 furs and fur-trimmed articles of women's clothing. The furs were placed in a rented truck and initially transported to the house of one James Skeens in Landover, Maryland. From there, at about 3:30 a.m. on the morning of 23 August 1964, the furs were taken to appellant Xydas' house in Prince George's County, Maryland, and shortly thereafter, still in the truck, were transported to a garage in Riverdale, Maryland, owned by Xydas' sister. The furs

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[1] Appellant and several others were originally named in a multicount indictment charging conspiracy and a number of substantive offenses. Upon motion, appellant was tried separately on three substantive counts charging burglary, grand larceny and interstate transport of stolen goods. He was acquitted on the first two charges and convicted on the third. Pursuant to a stipulation, the conspiracy charge was dismissed following trial of this case.

[2] 18 U.S.C. § 2314 provides in pertinent part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, . . . Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

were then unloaded from the truck and stored in the garage to await their anticipated sale to buyers from New York.[3]

Barnes[4] testified that on the morning of 22 August, before the burglary took place, he telephoned Xydas and "told him that I was going to make the French Poodle and that I had to have a place to store the furs until I could get a buyer down from New York," and that Xydas told him to "bring them out to his [Xydas'] house and put them in his basement." Barnes further testified, however, that when he and Skeens arrived at Xydas' house with the truck, Xydas refused to store the furs in his basement because there were more furs than Xydas had anticipated and his wife would object. According to Barnes, Xydas then suggested that the furs be stored in his sister's garage. For providing this assistance, Barnes related, Xydas was given two of the furs.

Appellant admitted his acquaintance with Barnes and Skeens and agreed that the furs had indeed been brought to his house and then transferred at his suggestion to his sister's garage. He denied, however, any knowledge of the theft of the furs prior to its occurrence, and testified that his first involvement in the situation came when he received a telephone call from Skeens at about 3:15 a.m. on the morning of Sunday, 23 August, informing him that

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[3] The furs were removed from the garage and apparently sold before the arrest of appellant or any of the others involved. The bulk of the furs were never recovered. Appellant's indictment did not charge him with any complicity of the interstate transportation of the furs from Maryland to New York.

[4] Barnes, a professional burglar, was the key witness in a number of cases involving the operations of a burglary ring in the District of Columbia. *See Wallace* v. *United States*, No. 21,134 (D.C. Cir. 6 May 1969); *Hamilton* v. *United States*, No. 21,889 (D.C. Cir. 31 July 1970). Appellant was tried after the *Wallace* trial, but before the *Hamilton* trial.

Skeens and Barnes wanted to come over to see him. He claimed that he first became aware of the furs and the fact that they were stolen when shortly thereafter Skeens and Barnes arrived at his home with the truck. He testified that he arranged for the storage of the furs in his sister's garage in order to turn Barnes and Skeens over to the FBI, and that he kept the two furs given him by Barnes in order to provide the FBI with evidence. Some three weeks later, and long after the furs had been removed from the garage and presumably sold by Barnes,[5] Xydas did in fact go to the FBI and related his version of his involvement with the furs, identifying Barnes and Skeens as the perpetrators of the French Poodle burglary. Xydas subsequently turned the furs he had been given over to the FBI.

II. THE DEFENSE SUBPOENA OF XYDAS' FBI INFORMANT'S FILE

Appellant argues that he was unfairly hindered in the presentation of his defense by the Government's refusal to produce, pursuant to subpoena, the entire contents of the FBI file relating to Xydas.

The theory of the prosecution was that Xydas had aided and abetted the interstate transportation of the stolen furs by agreeing prior to the theft to provide a place to store them.

The defense theory, on the other hand, was that Xydas did not become involved in the transaction until after the transportation from the District of Columbia to Maryland had been accomplished, and therefore he could not be an aider and abettor of a violation of 18 U.S.C. § 2314. Xydas' storing of the furs was presented as not being the result of any prior-to-the-theft arrangement, but rather

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[5] Barnes testified that the furs remained in the garage approximately four days.

as an attempt on his part to aid the FBI in capturing Barnes and Skeens. To buttress this view, the defense sought to show that Xydas had been acting as an unpaid confidential informant of the FBI for a number of years prior to the instant offense. In order to establish Xydas' past relationship with the FBI, prior to trial the defense attempted to subpoena the entire FBI file containing all memoranda of agents who had contacted Xydas periodically since 1959.

The Government provided the defense with all FBI reports in its possession containing statements made by Xydas to FBI agents concerning the offenses charged in the indictment, but emphatically resisted production of the remainder of the file. The Government contended that the documents sought, reports of FBI agents concerning their contacts with Xydas, were confidential intradepartmental memoranda, the disclosure of which would be detrimental to the FBI's law enforcement function by revealing information concerning the manner and procedures by which the FBI gathers and distributes criminal intelligence data.

In response to this claim of privilege,[6] the trial judge reviewed the FBI documents *in camera* and ruled thereon as follows:

> [T]here is nothing vitally important to you [the defense] contained in those records, but first the Court finds that there has been no showing of a particularized need for the disclosure of these confidential records of the Federal Bureau of Investigation. There is nothing of an exculpatory nature contained therein, and there is nothing that is material or relevant to the indictment in the pending case. As I previously

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[6] "The Government may be required to produce documents in its possession unless it makes a valid claim of privilege." *Mackey* v. *United States*, 122 U.S. App. D.C. 97, 98, 351 F.2d 794, 795 (1965).

pointed out, many of these contacts referred to a period of time long before the present offenses were even committed, and had no connection whatsoever with that offense.

Accordingly, the court granted the Government's motion to quash the subpoena. Prior to the trial court's quashing of the subpoenas, the Government, in response to the reasons stated by the defense as to why the production of the FBI file was necessary, offered a stipulation as to certain facts reflected in the file. As modified under the guidance of the trial judge after his *in camera* inspection of the file, the stipulation was accepted by the defense and provided the following information:

(1) the fact of appellant's displayed willingness expressed in June of 1959 to provide information on a confidential basis;
(2) the names of the FBI agents with whom appellant had principally been in contact;
(3) the date of each such contact as reflected in the FBI files;
(4) the pertinent instances in which appellant took the initiative in making the contacts; and
(5) a general description of the subject matter of the information provided by appellant.[7]

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[7] The entire stipulation as agreed to and entered into evidence was as follows (the names appearing above the text of the stipulation were written in by counsel on the margin of the actual stipulation in the places indicated herein by asterisks to represent the agent or agents with whom appellant was principally in contact during the respective periods indicated):

Bob Franklin

It is agreed and stipulated between counsel for the United States that on June 25, 1959, the defendant Xydas was first contacted by a Special Agent of the FBI concerning the possibility of his furnishing information to the FBI on a confidential basis. Inasmuch as he displayed a willingness to supply such information, he was thereafter contacted either at his request or at the request of

Rule 16(a), F. R. Crim. P., authorizes the trial court to permit inspection by the defendant of any "written or recorded statements" of the defendant which are in the

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various Special Agents on the following dates: 7/20/59; 7/23/59; 8/8/59; 9/22/59; 10/23/59. On 11/13/59 contact with defendant Xydas was terminated.

Carl Giovanetti

Contacts with defendant Xydas were reinstituted by the FBI on 9/23/60 and he was thereafter contacted on the following dates: 9/28/60; 11/2/60; 12/12/60; 1/9/61; 1/13/61; 2/4/61; 2/21/61; 3/10/61; 4/7/61; 4/12/61; 5/9/61; 6/5/61; 6/22/61; 7/11/61; 7/17/61; 8/18/61; 9/26/61; 10/2/61; 10/6/61; 11/17/61; 12/14/61; 1/18/62; 2/4/62; 3/21/62; 4/19/62; 5/14/62; 6/26/62; 8/9/62; 9/6/62; 9/24/62; 10/22/62; 11/16/62; 12/31/62; 1/21/63; 2/28/63; 4/2/63; 5/3/63; 5/6/63; 5/7/63; 6/12/63; 6/18/63; 6/19/63; 6/27/63; 7/8/63; 8/5/63; 8/23/63; 9/4/63; 9/23/63; 11/4/63; 11/5/63; 11/7/63; 11/21/63; 11/23/63; 11/24/63; 12/5/63; 1/10/64; 2/18/64; 3/10/64; 4/9/64; 4/10/64; 5/14/64. On the latter date contacts with defendant Xydas were again terminated.

Richard Marquise
Edward Wills

On 9/15/64, the defendant Xydas contacted Special Agents of the FBI and furnished information concerning the burglarly of the French Poodle Dress Shop. Xydas took the initiative in this contact, having come to the Washington Field Office of the FBI. He was also interviewed about this matter 9/16/64; 9/22/64; 9/23/64; 10/2/64; 11/3/64, during which interviews he was not then being "operated" as an informant.

Gib McNeely

On 12/2/64 defendant Xydas was recontacted to renew attempts to develop him as an informant concerning these and other matters. He was thereafter contacted on the following dates: 12/3/64; 12/8/64; 12/9/64; 1/9/65; 2/8/65; 3/8/65; 3/15/65; 4/6/65; 4/29/65; 6/8/65; 6/22/65; 7/20/65; 8/19/65; 9/15/65; 10/5/65; 11/5/65.

Since regular contact was ceased by the FBI on

Government's possession.[8] On this appeal the Government argues that the FBI reports here in question cannot be considered "statements" of the defendant "since they are reports made by agents in a manner prescribed by the Bureau and are not limited to transcriptions of statements

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11/18/65, no further effort was made to develop Xydas as an informant. However, on 1/7/66, the defendant Xydas contacted an agent of the FBI concerning an investigation currently being conducted by the Internal Investigative Unit of the Washington, D. C. Metropolitan Police Department. A similar contact was again made 5/2/66, upon Xydas' initiative.

Some of the above referred to contacts beginning in 1969 resulted in obtaining no information concerning the matters inquired into and some resulted in obtaining merely non-specific, general information. The information supplied to the FBI by the defendant Xydas, as a result of the contacts since 1959, has largely concerned gambling matters and has been of generally intelligence-type information concerning his associates.

[8] While the documents here involved were sought via subpoena under Rule 17, Fed. R. Crim. P., this, where the subpoena seeks documents in the possession of the Government, is simply an alternative means of obtaining information available under Rule 16 motions to produce for inspection and copying. Although Rule 17 was not intended as a discovery device, prior to 1966 its use involved discovery consequences because it permitted the pre-trial production of certain "evidentiary" material which could not have been obtained under Rule 16. The 1966 amendment, however, broadened Rule 16 to the point where there is no longer any information obtainable via subpoena which is not covered by Rule 16. *See* 1 Wright, Federal Practice and Procedure § 274 (1969). For the purposes of this case, we see no relevant differences between Rules 16 and 17 in the criteria governing disclosure of the documents here sought. We therefore deal with appellant's contention that the subpoena was improperly quashed by evaluating it in light of the trial judge's power to control discovery under Rule 16.

made by appellant to the agents." Rather, the Government insists, any discovery must be sought under the terms of subsection (b) of Rule 16 which permits discovery of "other documents" in the control of the Government only upon a showing of materiality and reasonableness. We need not decide which subsection of Rule 16 is applicable here, however, since neither subsection (a) nor (b) grants appellant any discovery as of right in all cases; discovery under either section is subject to the sound discretion of the trial court. Rule 16(e) provides, *inter alia*, that:

> Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate.[9]

We are satisfied that in view of the considerations advanced by the Government in support of its claim of privilege, the trial court here followed the proper course in inspecting the documents sought *in camera*, and did not abuse its discretion in quashing the subpoena following such inspection.[10] We have carefully examined these documents ourselves, in light of the indictment and record in

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[9] It is true that discovery under Rule 16 (a) is, as a rule, almost automatically available to the defendant since no showing of any kind is required of him as a prerequisite to production of the documents sought. However, where, as here, the Government opposes production and advances reasons why the documents should not be disclosed, the court has discretion to deny or limit discovery as detailed in Rule 16 (e). *See United States* v. *Bryant*, No. 23,957 (D.C. Cir. 29 Jan. 1971); *United States* v. *Projansky*, 44 F.R.D. 550, 554 (S.D.N.Y. 1968; *United States* v. *Federman*, 41 F.R.D. 339, 341 (S.D.N.Y. 1967); 1 Wright, Federal Practice & Procedure, § 353, n. 33 (1969).

[10] *See Taglianetti* v. *United States*, 398 F.2d 559 (1st Cir. 1968); *United States* v. *Curry*, 278 F. Supp. 508 (N.D. Ill. 1967).

this case, and we are in agreement with the trial judge's evaluation that "there is nothing of an exculpatory nature contained therein, and there is nothing that is material or relevant to the indictment in the . . . [instant] case." Furthermore, it appears that every reason asserted by appellant at the pre-trial hearing for desiring to inspect these documents was fully met by the stipulation, in which the Government admitted that Xydas had served as a confidential informant to the FBI.[11]

A reading of the transcript compels the conclusion that the principal issue tendered to the jury was not whether Xydas had cooperated with the FBI on other occasions, but rather why, if Xydas' intent in assisting in the storage of the stolen furs was to help in the apprehension of Barnes and Skeens, did he not get in touch with his FBI contacts until over three weeks had passed and the furs

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[11] Appellant's counsel argued that the records should be made available to him in order to (1) show that Xydas had in fact cooperated with the FBI; (2) learn the dates of Xydas' contacts with the FBI in order to show their continuity; (3) learn which agents had contacted Xydas during various periods in order to know which agents to call as defense witnesses; (4) learn to what extent Xydas had initiated the contacts. In view of the Government's claim of privilege we think that these purposes were all adequately fulfilled by the stipulation.

At another point, however, counsel stated:

> These are subpoenas issued for these documents. I think I have a right to look at them and see if there is anything in the documents that could be helpful to the defense. That is the reason I subpoenaed them.
>
> This, of course, is nothing more than a statement of a desire to go on a "fishing expedition" in confidential government records in the hope that something "helpful to the defense" might turn up. In such circumstances, privilege may properly be invoked by the Government to prevent such disclosure.

were long gone from his sister's garage.[12] Xydas' testimony in explanation of this delay appears to us patently incredible and we have little doubt that the jury so evaluated it.

III. THE PROSECUTION'S NON-DISCLOSURE OF "EXCULPATORY" INFORMATION

Even if Xydas' claim that he assisted in storing the furs only to aid the FBI is rejected, however, Xydas' conviction for aiding and abetting the interstate transport of the stolen furs must rest upon proof of some assistance rendered by him before or during the occurrence of the interstate transportation. The Government's case in this respect rested upon the testimony of Barnes that Xydas had agreed on the morning of the French Poodle burglary to supply an interim storage place for the furs. As recounted *supra*, Xydas denied any prior knowledge of the burglary or the making of any prior arrangement with Barnes. Thus, if Xydas' testimony were to be believed that he first knew of and agreed to store the furs when Barnes and Skeens arrived at his house at 3:30 a.m., he would merely be guilty of receiving stolen goods or of being an accessory after the fact of the interstate transportation, offenses with which he was not charged in the instant indictment. Clearly, the jury was presented with the decision of whom to believe on this issue, Barnes or Xydas; and, equally clearly, on the testimony presented, the jury chose to believe Barnes and to disbelieve Xydas.

Nevertheless, it must be noted that the truckload of furs was first taken from the District of Columbia to the house

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[12] As noted *supra*, Barnes testified that the furs were removed from the garage after four days. On cross-examination Xydas admitted that when he finally went to the FBI some three weeks later, he stated that he wanted to get his involvement in the French Poodle offense "off his conscience."

of James Skeens in Maryland. Subsequently the furs were taken to Xydas' house, and then to his sister's garage. Prior to the commencement of the trial Xydas' counsel requested access to the grand jury minutes of a number of individuals involved in or related to the offenses charged in the indictment. Among these was Marsha Skeens, the wife of James Skeens. In addition to requesting this testimony generally under the doctrine of *Dennis* v. *United States*[13] for the purpose of impeachment of government witnesses, counsel also explicitly requested that he be provided with such portions of the grand jury testimony of Marsha Skeens and others, which contained statements exculpatory of appellant Xydas, under the doctrine of the *Brady*[14] and *Levin* cases.[15] Although the Government generally opposed such disclosure, the trial judge undertook an *in camera* review of the grand jury testimony of these individuals in order to exclude therefrom extraneous matter, and references to certain names and matters still under investigation in other cases, or deserving of protection from adverse publicity, and to determine whether any exculpatory statements were contained therein. While portions of the grand jury testimony of some of these persons were provided to the defense, it does not appear

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[13] 384 U.S. 855 (1966).

[14] *Brady* v. *Maryland*, 373 U.S. 83 (1963).

[15] *Levin* v. *Katzenbach*, 124 U.S. App. D.C. 158, 363 F.2d 287 (1966), on appeal after remand, *Levin* v. *Clark*, 133 U.S. App. D.C. 6, 408 F.2d 1209 (1967). In a document filed in the trial court prior to trial the Government set forth its understanding of its duty to be that "*Brady* and *Levin* require that the Government disclose such evidence which in the context of the given case might lead the jury to entertain a reasonable doubt about the defendant's guilt." The Government then represented that it had examined its files and found nothing, not already disclosed, that was required to be provided to the defense under *Brady* and *Levin*.

that any portion of Marsha Skeens' testimony was revealed.[16] It is from this set of facts that the second major issue of this appeal rises.

Subsequent to the trial of this case, while appellant's counsel was engaged in the trial of a related case, he came across a portion of the grand jury testimony of Marsha Skeens in which she testified as follows:

> Well, when the furs were stolen, they had taken them to my house to begin with, and my neighbors were having a—you know, they watch me anyway. So they decided not to leave them there and they took them to Steve Xydas's sister or mother—somebody's—I don't know whether it was his sister's or his wife's garage.

In considering the significance of this statement, it is first apparent that it is not an unequivocally exculpatory one. It does not state that Xydas was not contacted before the French Poodle burglary took place, nor does it negate the possibility that storage arrangements for the furs may have been made ahead of time with Xydas on an alternative basis. Rather, it ambiguously relates that the burglars "decided," at some unspecified time, not to leave the furs at Skeens' house and instead took them to Xydas's sister's.

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[16] Marsha Skeens was not called as a witness by the Government, and therefore, under the *Dennis* case, general discovery of her testimony was not available to the defense. *See Allen* v. *United States*, 129 U.S. App. D.C. 61, 390 F.2d 476 (1968). Apart from the requirements of *Dennis*, however, appellant was entitled to exculpatory information in the Government's possession, including any contained in the grand jury minutes, whether or not the witness testified at trial. For example, in the instant case, a portion of the grand jury testimony of James Skeens, which was of an exculpatory nature as to appellant's involvement in the offenses charged in the first two counts of the indictment, was provided to the defense prior to the trial, even though Skeens himself never testified at trial.

Nevertheless, the statement does suggest the possibility that the decision to involve Xydas was not taken until after the furs were already at Skeens' house in Maryland.

Granting, then, that the statement has some significance for the defense case, the question becomes whether it was sufficiently "favorable" to appellant that the failure of the prosecution to provide it was reversible error under *Brady* v. *Maryland*.[17] Or, alternatively, as the test has been stated in this Circuit, whether if the defense had been provided with the statement, it may have been able to secure evidence that "might have led the jury to entertain a reasonable doubt about [defendant's] guilt."[18] We have concluded that it would not. In the words of Judge McGowan's statement issued on denial of rehearing *en banc* in *Levin*, in which Judges Leventhal and Robinson concurred, we do not think the circumstances here reveal one of "those particular situations where a fair trial may have been significantly blurred by the Government's failure to comply with a request for information."[19]

In the first place, this case is distinguishable from *Levin*, in that there the defense did not learn the threshold information which would have served to stimulate its own inquiry into the subject upon which the prosecution failed to disclose information until after the trial was already in progress.[20] In *Levin*, the information withheld was the

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[17] *Brady* held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963).

[18] *Levin* v. *Clark*, 133 U.S. App. D.C. 6, 9, 408 F.2d 1209, 1212 (1967).

[19] *Id.* 133 U.S. App. D.C., at 19, 408 F.2d, at 1222.

[20] *Id.* 133 U.S. App. D.C., at 11 n. 29, 22, 408 F.2d, at 1214 n. 29, 1225.

fact that two bank officials did not remember the money that was allegedly stolen having been brought to the bank and changed from thirty-five $1000 bills into bills of smaller denominations, as two of the key prosecution witnesses had testified to have occurred. The fact of this clearly demonstrated non-remembrance would have undermined seriously the prosecution's case, had it been presented to the jury. However, defense counsel was in no position to discover this information prior to trial, since he did not become aware of the "threshold" information that the bills were alleged to have been changed at all until well after the trial started. By contrast, in the instant case, not only was the withheld information of ambiguous significance, but also it clearly appears from the transcript that appellant's counsel was aware, prior to trial, both that the furs were first taken to the Skeens' house[21] and that Marsha Skeens "was privy to all . . . that happened."[22] Furthermore, there is nothing to indicate that Marsha Skeens was not available to be called as a defense witness; indeed the defense hinted that it might call her as a basis for requesting her grand jury testimony, but she was never called. And the issue on which the withheld information bore, whether Xydas was contacted before or after the transportation of the furs to Maryland, was not, as in *Levin*, one whose significance

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[21] Indeed, as part of its preparation, the defense prepared a map showing the relative distances from the site of the French Poodle burglary to both Skeens' and Xydas' houses. This map was introduced into evidence as part of the defense case.

[22] Tr. Vol. I, p. 39. Xydas' counsel had been one of the defense counsel in the prior *Wallace* trial, see note 4, *supra*, the transcript of which we take judicial notice, where Barnes, while testifying regarding the French Poodle burglary, had related that the furs were first taken to Skeens' house and that Marsha Skeens had actually been present at the French Poodle while the burglary was in progress.

as hidden from the defense until well after trial began, but rather was part of the defense theory of the case from the beginning. With the foregoing in mind, we proceed to inquire into how lack of knowledge of Marsha Skeens' statement before the grand jury might have affected the defense's presentation of its case.

Given the defense's knowledge that the furs were initially taken to the Skeens' house, and that Marsha Skeens was "privy" to this, these, and only these, possibilities present themselves with respect to the nature of the defense's pre-trial preparation:

1. The defense did not even attempt to interview Marsha Skeens.

2. An attempt was made by the defense to interview Marsha Skeens but she could not or would not provide them with any relevant information.

3. Marsha Skeens was interviewed by the defense and she either (a) confirmed the fact that Xydas was not contacted until after the furs had reached the Skeens' house, or (b) indicated that prior storage arrangements had in fact been made with Xydas.

Only in the first of these cases would the pre-trial knowledge of Marsha Skeens' grand jury statement have any effect whatsoever on the conduct of the defense's case. And in such a situation, given the defense's knowledge of the stop at the Skeens' household, and its already formulated theory of the case, failure to attempt to interview such a crucial witness[22] would represent such slovenly pre-trial

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[22] From the high caliber of the defense's presentation of its case, as evident in the record, we deem it highly unlikely that any such failure occurred. Rather, in all probability Marsha Skeens was interviewed on the very point at issue but failed to provide sufficient information to justify calling her as a witness.

preparation that the lack of any testimony that Marsha Skeens might have supplied cannot reasonably be attributed to the prosecution's failure to disclose the information here in question. In other words, the most that pre-trial knowledge of this particular grand jury testimony would have done, given the posture of the case and the information already in the hands of the defense, would have been to alert counsel of the importance of interviewing Marsha Skeens, something of which he clearly was already sufficiently aware.

We therefore hold that the failure of the prosecution to disclose the contested grand jury statement was not reversible error, since under the circumstances here reasonable pre-trial preparation by the defense would either have confirmed, denied, or rendered immaterial the latent implication in Marsha Skeens' testimony that appellant Xydas *may* not have made prior arrangement to store the furs. Given the facts of this and the related *Wallace* case, and appellant's counsel's demonstrated knowledge of those facts, that no direct proof along the lines of the possible implication in the grand jury testimony was introduced is the best indication such proof did not exist.

We have considered the remaining points urged by appellant as requiring reversal but find them without merit. The judgment of the trial court is therefore

Affirmed.

BAZELON, *Chief Judge, concurring:* I concur in the Court's analysis of the issues in this case. Though the question of prejudicial error is very close for me, I agree that this conviction must be affirmed.

I would like to add, however, that I do think that Marsha Skeens' statement was sufficiently "favorable" to appellant so that its disclosure was required under the doctrines

of *Brady* and *Dennis*. Granted that the statement may have been useful only to inform counsel that Marsha Skeens might be a critical witness, this is precisely the kind of lead which, in another case, might have had major consequences for counsel's trial strategy. Defense counsel are not blessed with an infinite amount of time in preparing criminal cases; therefore, leads from the grand jury minutes may often be of critical importance. We have held in Allen v. United States, 129 U.S. App. D.C. 61, 390 F.2d 476 (1968), that there must be clear and compelling considerations for denying to the defense access to the minutes—considerations bearing primarily upon whether there is any real need for secrecy. I agree with Judge Fahy, dissenting in Young v. United States, 132 U.S. App. D.C. 142, 406 F.2d 960 (1968), that the rule should not be restricted to witnesses who testify at the trial.

I think this case indicates again the hazards of relying on the prosecutor and the trial judge to look after the defendant's interests.

APPENDIX B

Title 18 USC, Section 2314

Transportation of stolen goods, securities, moneys, fraudulent State Tax stamps, or articles used in counterfeiting.

Whoever transports in interstate . . . commerce any goods, wares, merchandise, . . . of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; . . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1737

STEVE P. XYDAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Columbia, petitioner was convicted of interstate transportation of stolen goods (the French Poodle burglary in August 1964) in violation of 18 U.S.C. 2314.[1] He was sentenced to one to three years' imprisonment. The court of appeals affirmed in a comprehensive opinion, Judge Bazelon concurring (Pet. 1a-18a).

[1] He was acquitted by the jury on two other counts involving the Haley housebreaking in May 1964.

The government's evidence is detailed in the opinion below (Pet. 2a-4a). In essence, it showed that sometime after closing on the evening of August 22, 1964, the French Poodle Dress Shop in Washington, D. C., was burglarized by three men (Barnes, Baker and Hamilton) and some ninety-six furs and other articles of women's clothing were stolen. Barnes—a professional burglar who had been a key government witness in numerous burglary cases arising in the District of Columbia (Pet. 3a, n. 4)—testified as a government witness that on the morning prior to the burglary he had telephoned petitioner, advised him of what was planned and that a location was needed to store the furs until he could "get a buyer down from New York, * * *" (Pet. 3a). According to Barnes, petitioner responded that the furs could be stored in the basement of his home in Prince George's County, Maryland (Pet. 3a). Following the theft, the furs were taken to the home of one James Skeens in Landover, Maryland. From there (at about 3:30 a.m. on August 23) they were transported to petitioner's home. Petitioner, however, refused to store them because there were more furs than he had anticipated; at his suggestion they were stored in the garage of his sister's home until they were sold four days later. Barnes testified that he gave petitioner two of the stolen furs in exchange for his participation.

Petitioner's defense at trial was that while he had provided assistance in the storage of furs by suggesting his sister's house, he was not aware of the burglary until the furs were brought to his house and at most could be guilty as an accessory after the fact,

a crime with which he was not charged. He also adduced evidence that he had been an F.B.I. informant in the past. The evidence further showed that petitioner had reported the theft to the F.B.I. in about the middle of September, several weeks after the furs had been sold.

Petitioner raises a variety of complaints—in large measure directed to the government's alleged failure to produce relevant documents for his inspection. These were considered by the court below and found wanting. They provide no occasion for further review by this Court.

1. Petitioner contends (Pet. 5-6) that his case was prejudiced because he was not permitted to inspect the entire F.B.I. file containing all reports of agents concerning their contacts with him since 1959. He urges that this hindered the defense in its efforts to convince the jury to acquit him because he was a confidential informant for the Bureau. As the opinion below shows (Pet. 4a-11a), this defense tactic was not frustrated by the production procedures followed by the trial court.

The defense was provided with all the F.B.I. reports in the file dealing with statements made by the petitioner to agents concerning the offenses on which he was being tried. All the remaining documents in the file were subject to an *in camera* inspection by the trial judge; he concluded that these documents contained nothing of an exculpatory nature, nor anything material or relevant to the charges (Pet. 5a-6a). The court of appeals also "carefully examined" these documents and agreed with the trial court's eval-

uation (Pet. 9a-10a). Additionally, a stipulation was entered into at trial containing, *inter alia*, the dates of all contacts between the petitioner and named F.B.I. agents, the persons who initiated the contacts and a general description of the information furnished by petitioner (see the opinion of the court of appeals at Pet. 6a-8a, n. 7, which sets forth the stipulation in full). As the court below observed, the defense's purpose in obtaining the document was adequately achieved by the actual procedures followed at trial (Pet. 10a-11a); at the same time the government was protected from an unwarranted fishing expedition into confidential criminal intelligence reports. Cf. *Taglianetti* v. *United States*, 394 U.S. 316, 317.[2]

2. It is further contended that petitioner was denied a fair trial because of the joinder of the counts relating to the Haley housebreaking when, in fact, the government knew he was innocent of any connection with that robbery. It is urged that this charge was added as a device to prejudice him on the French Poodle count. This assertion of governmental wrongdoing is not supported by any hard facts. Petitioner relies rather upon an extravagant reading of alleged exculpatory evidence, some of which was not allowed in at trial.[3] The fact of the matter is that Barnes, an

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[2] The related claim that petitioner was denied access to exculpatory grand jury testimony which would have aided his case on the French Poodle charge (Pet. 10-11) is fully answered by the opinion below, upon which we rely (Pet. 11a-18a).

[3] Barnes did not exonerate petitioner in his out-of-court statements made on other occasions (see Pet. 13-14). Nor,

admitted participant in both robberies, squarely implicated petitioner in the Haley robbery in his trial testimony. Moreover, the trial judge reviewed the grand jury testimony of Barnes, Skeens and others and turned over certain of this testimony to the defense. Indeed, the claim that the Haley charges must have prejudiced petitioner before the jury is belied by the fact that the jury acquitted him of those charges while convicting on the other.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1971.

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as petitioner argues, did the grand jury testimony of Skeens, another participant in both burglaries, exonerate petitioner. Skeens testified that he thought petitioner had told Barnes that Pat Haley had won a considerable amount of money from him on a numbers bet, but that "[a]s far as him [petitioner] knowing that he set up the job, I don't know that" (Pet. 15).

Similarly the trial judge properly rejected the admission into evidence of a taped telephone conversation between Skeens and petitioner in February 1966. In these recordings, which were played for the defense prior to trial, Xydas denied his participation in the Haley housebreaking. This, however, was the same position he took at trial and the government never alleged that petitioner had ever admitted participation in the Haley robbery.

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